

Notice
of Rulemaking Hearing
Tennessee Ethics Commission
Chapter 0580-1-3
Rules Pertaining to Complaint Proceedings

The Tennessee Ethics Commission will hold a public hearing to receive comments concerning new rules, pursuant to T.C.A. § 3-6-107(1). This hearing will be conducted as prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-201 et seq., and will take place in the State Library and Archives Building, Capitol Blvd., Nashville, Tennessee, at ____ a.m. CDT on _____, 2007.

Written comments will be considered if received by close of business, _____, 2007, at the office of the Tennessee Ethics Commission, 201 4th Ave. N, Suite 1820, Nashville, TN 37248; 615-253-8634.

Individuals with disabilities wishing to participate in these proceedings (or to review these filings) should contact the Tennessee Ethics Commission, 201 4th Ave. N, Suite 1820, Nashville, TN 37248, 615-253-8634, to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, by telephone, or other means, and should be made no less than ten (10) days prior to _____, 2007 or the date such party intends to review such filings, to allow time to provide such aid or service. Hearing impaired callers may use the Tennessee Relay Service (1-800-848-0298).

Complete copies of the text of the notice may be downloaded from the web at <http://state.tn.us/sos/tec/index.htm>, or may be obtained by contacting Anne F. Turner, Tennessee Ethics Commission, 615-253-2665, 201 4th Ave. N, Suite 1820, Nashville, TN 37248.

Substance of Proposed Rules
of
The Tennessee Ethics Commission

Chapter 0580-1-3
Rules Pertaining To Complaint Proceedings

New Rules

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This updated draft contains changes suggested by the Commissioners at their September 27, 2007 meeting, as well as changes suggested by individual Commissioners following the meeting. In addition, Commissioner Neal's comments regarding the scheduling of probable cause hearings have been added back in from the July 2007 draft as a reminder of her concerns for Commission discussion purposes.

0580-1-3-.01 PURPOSE AND SCOPE.

These rules are promulgated for the purpose of providing procedures for processing, investigating and adjudicating complaints by the Tennessee Ethics Commission pursuant to the provisions of Title 3, Chapter 6 of the Tennessee Code Annotated.

Authority: T.C.A. §§ 3-6-105 through 3-6-107, 3-6-201, et seq., 3-6-308.

0580-1-3-.02 DEFINITIONS.

- (1) Commission. The Tennessee Ethics Commission.
- (2) Executive Director. The Executive Director of the Tennessee Ethics Commission.

(3) Executive Staff. A staff person or employee of the executive branch of Tennessee state government, except those persons who hold any office or position enumerated in T.C.A. § 8-50-501(a).

(4) General Counsel. The Commission's senior staff attorney.

(5) Legislative Staff. A staff person or employee of the legislative branch of Tennessee state government, except those persons who hold any office or position enumerated in T.C.A. § 8-50-501(a).

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Authority: T.C.A. §§ 3-6-107(1), 3-6-306(a)(3)(B).

0580-1-3-.03 RECEIPT AND INVESTIGATION OF COMPLAINTS.

- (1) Complaints shall be received by the Commission or initiated by the Commission in accordance with the provisions of T.C.A. § 3-6-201.
- (2) Complaint proceedings and records relating to a preliminary investigation shall be kept confidential by Commission staff and Commission members in accordance with the requirements contained in T.C.A. § 3-6-202.
- (3) Upon receipt of a complaint, the Commission's General Counsel or designee shall determine, in accordance with the provisions of T.C.A. § 3-6-203, whether the complaint meets the threshold statutory requirements to be treated as a cognizable complaint, including whether it alleges violations of laws which are within the jurisdiction of the Commission to enforce; provided, however, complaints against a candidate in any election shall be processed in accordance with the procedures set forth in T.C.A. § 3-6-201(e).
 - (a) If the complaint alleges violations of the laws that are within the jurisdiction of the Registry of Election Finance, the Commission's General Counsel or designee shall refer the complaint to the Registry of Election Finance and provide notice of such referral to the alleged violator and to the complainant in accordance with the requirements of T.C.A. §§ 3-6-201(e), 3-6-201(f) and 3-6-203(a).
 - (b) If the Commission's General Counsel or designee determines that the complaint is not covered by subsection (a) above and either does not meet the threshold statutory requirements to be treated as a cognizable complaint, or does not allege violations of laws that are within the jurisdiction of the Commission, the Executive Director shall dismiss the complaint and provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f) and 3-6-203(a).
 - (c) If the Commission's General Counsel or designee determines that the complaint meets the threshold statutory requirements to be treated as a cognizable complaint and to allege violations of laws that are within the Commission's jurisdiction, the Executive Director shall provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f), and shall refer the complaint to the Office of the Attorney General and Reporter for investigation, in accordance with the requirements of T.C.A. § 3-6-203(b).

Authority: T.C.A. §§ 3-6-201 through 3-6-203.

0580-1-3-.04 PROBABLE CAUSE HEARINGS.

- (1) Upon receipt of the report of the Office of the Attorney General and Reporter, the Executive Director shall schedule a probable cause hearing, in consultation with the Commission, for a date at least 45 days after the complainant and alleged violator have received notice of the probable cause hearing pursuant to paragraph (2) below. The Executive Director shall coordinate with the complainant and alleged violator in an effort to avoid a scheduling conflict, but the Commission shall have final authority to set the date, time and place of the hearing.
 - (a) The complainant or alleged violator may move the Commission for a continuance of the probable cause hearing, which the Commission may, in its discretion, grant for good cause shown.

- (b) The probable cause hearing shall not be a meeting under the provisions of the Tennessee Open Meetings Act, but shall be closed to the public as provided in T.C.A. § 3-6-202, unless the alleged violator requests in writing that the investigation and associated records and meetings be made public as provided in T.C.A. § 3-6-202(a)(1)(A).
- (c) The probable cause hearing shall not be required to be held pursuant to the contested case provisions of the Uniform Administrative Procedures Act, T.C.A. § 4-5-301, *et seq.*
- (2) Upon scheduling the probable cause hearing, the Executive Director or designee shall provide to both the complainant and the alleged violator, via certified mail, return receipt requested, by other mail service which provides verification of service, or by personal service, notice that includes the following:
 - (a) A copy of the report of the Office of the Attorney General and Reporter;
 - (b) The date, time and location of the probable cause hearing; and
 - (c) The opportunity to choose, in writing at least thirty (30) days before the scheduled hearing, one (1) of the following options:
 1. Appear personally or through an attorney to present oral testimony and any documents that the party wishes the Commission to consider; or
 2. Appear by sworn, notarized statement, including any pertinent exhibits which the party wishes the Commission to consider.
 - (d) If a party does not timely choose one of the foregoing, the party shall be deemed to have waived the right to present oral or written testimony and exhibits.

I believe that you have ignored the plain reading of the statute when you move too quickly to set a probable cause hearing as you do in 0580-1-3-.04 (1). In 3-6-203(b) the law is that the Commission has the authority to make a probable cause determination upon receipt of the A.G.'s report. That indicates, to me, that, unless the parties request to present evidence, the Commission shall make a determination of probable cause based solely on the investigation and report. (As a matter of policy, I also believe this ensures greater confidentiality until a statutorily mandated time arrives.)

The law allows the Commission to establish the means by which parties may present such evidence. There is no statutory requirement that we allow the parties to appear at this point, although our rules could permit. But I believe the Commissioners need to decide on this issue after a review of all implications.

§3-6-203(b) states that "Both the alleged violator and the complainant shall be entitled, upon request, to present evidence before the commission prior to the commission's probable cause determination". If the Commission first chooses to review the complaint in a closed meeting, the Commission could still not make a determination until they had offered to the parties the opportunity to present evidence.

Although the statute does not dictate the manner in which the party may "present evidence before the Commission", the potential economic and political ramifications of a complaint are quite serious for the alleged violator, and the complainant must know that credible complaints will be thoroughly investigated and adjudicated. Accordingly, it is recommended that alleged violators and complainants be provided the opportunity to present evidence both by the submission of written documentation and by personal appearance prior to the Commission making a probable cause determination.

Presumably, the majority of accused violators will wish to avail themselves of the opportunity to personally present evidence, and thus the Commission will not be making a final determination until the parties have been heard. If the Commission first "reviewed" the complaint in a closed meeting, the Commission would then have to hold a second closed meeting for the parties to present evidence. Rather than scheduling such a "preliminary probable cause hearing", I believe that it is more efficient simply to automatically offer the parties the option to present evidence from the beginning (and by policy, the Commissioners will always be provided a copy of the complaint prior to the meeting in order to afford the opportunity for each to individually familiarize himself or herself with the complaint and the investigation). In addition, since the proceedings must be kept confidential under either scenario, I would

submit that less risk to confidentiality exists when there is one hearing, rather than a meeting and then a hearing.

- (3) If the complainant or alleged violator intends to appear and present oral testimony at the probable cause hearing (with or without counsel), the documents that the party intends to submit must be filed with the Commission office, marked as the party's exhibits, at least twenty (20) days before the probable cause hearing. Deleted: will
- (4) A complainant or alleged violator wishing to appear by sworn notarized statement must submit the statement and any accompanying documentation to the Commission office at least twenty (20) days before the probable cause hearing. Deleted:
- (5) The Commission shall provide for a court reporter to transcribe the hearing.
- (a) Such hearing record shall be maintained in accordance with the confidentiality provisions contained in T.C.A. §§ 3-6-202 through 203. Formatted: Indent: Left: 37.05 pt, Hanging: 34.2 pt
- (b) Notwithstanding any provisions to the contrary contained in the Rules of the Tennessee Ethics Commission, Chapter 0580-1-2, Access to Public Records of the Tennessee Ethics Commission, any party to the proceeding or the party's legal counsel, as authorized under the confidentiality provisions contained in T.C.A. §§ 3-6-202 through 203, may obtain a written transcript of the proceeding directly from the court reporter at the party's own expense. Formatted: Indent: Hanging: 1.05 pt
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- (5) At the probable cause hearing, if a party has chosen to appear personally or through an attorney, any individual Commission member or the Commission's General Counsel or designee may question the individual presenting oral or written evidence.
- (7) The Commission may limit the presentation of the oral testimony or the admission of exhibits if the Commission determines such evidence to be duplicative of evidence already submitted, irrelevant to the factual or legal questions pending before the Commission, or that the Commission otherwise determines should not be admitted into evidence. In determining whether or not probable cause exists, the Commission may rely upon the Tennessee Rules of Civil Procedure or the Tennessee Rules of Evidence, but shall not be bound by such Rules of Civil Procedure or Rules of Evidence. Deleted: is not bound by
- (8) If the Commission determines that no probable cause exists to believe that a violation of any law or rule administered and enforced by the Commission has occurred, the Commission shall dismiss the complaint by issuing a written report in the form of an order, copies of which shall be provided to the complainant and the alleged violator by personal mail, certified mail, return receipt requested, or by other mail service which provides verification of delivery. Such order shall:
- (a) State with particularity the Commission's reasons for dismissal of the complaint;
- (b) Inform the complainant of the opportunity to request a rehearing, pursuant to T.C.A. § 3-6-203(b)(1), by submitting a request in writing, which states with specificity the reasons why the complainant contends that the Commission's finding of no probable cause was erroneous, to the Commission office and to the alleged violator no later than ten (10) business days after the date on which the Commission's report is postmarked by personal service, certified mail, return receipt requested, or by other mail service which provides verification of delivery.
- (9) If a complainant timely files and serves a request for rehearing in compliance with subsection (a) above, the Executive Director shall schedule a rehearing by the Commission, at which the Commission shall consider the complainant's reasons for contending that the original finding of no probable cause was erroneous, and shall determine whether or not to grant the request for a rehearing. The Commission's meeting to consider the request shall not be a public meeting, but shall be closed to the public as provided in T.C.A. § 3-6-202, unless the alleged violator requests in writing that the investigation and associated records and meetings be made public as provided in T.C.A. § 3-6-202(a)(1)(A).
- (10) If the Commission grants the complainant's request for a rehearing, the Commission shall hold a rehearing at which both parties shall be permitted to be heard. No additional documents or information shall be introduced unless the documents and information were unknown and unavailable at the time of the original

probable cause hearing. Unless there are newly discovered documents or information, the rehearing shall be limited to alleged errors in the Commission's original dismissal on a finding of no probable cause.

- (11) If, after reconsideration, the Commission determines that there is no probable cause, the Commission may order the complainant to reimburse the alleged violator for any reasonable costs and reasonable attorney fees that the alleged violator has incurred in connection with such request for rehearing, as substantiated in an affidavit submitted by the alleged violator. Likewise, if the Commission finds that the complainant engaged in any of the conduct described in T.C.A. § 3-6-208(a), the Commission shall have the discretion to impose the sanctions described in that section and the alleged violator shall have the rights described in T.C.A. § 3-6-208(b).
 - (a) The Commission's order shall set forth a schedule in which any fees and costs assessed by the Commission must be paid by the complainant.
 - (b) Any costs or fees that are not paid in accordance with the schedule contained in the order shall be referred to the office of the Attorney General and Reporter for collection in accordance with state law.
- (12) Upon a determination of no probable cause, if the alleged violator has not previously requested that the matter be made public, the Commission shall make public the records and proceedings in the matter sixty (60) days after the later of: (1) the date the Commission enters its report of no probable cause, if the complainant does not request a rehearing, or (2) the date the Commission enters its Order denying the complainant's request for a rehearing, or (3) the date the Commission enters its Order of no probable cause after a rehearing.
- (13) Upon a determination of probable cause, if the alleged violator has not previously requested that the matter be made public, the Commission shall make public the records and proceedings in the matter on (1) the date the public hearing to determine whether a violation has occurred commences; or (2) the date the Commission refers to the appropriate house of the general assembly a finding that probable cause exists to believe that a member of the general assembly has committed an act constituting misuse of office for personal financial gain.

Authority: T.C.A. §§ 3-6-201 through 3-6-203, 3-6-207 through 3-6-208.

0580-1-3-.05 PUBLIC COMPLAINT HEARINGS

- (1) If the Commission determines that probable cause exists to believe that a violation of a law or rule administered and enforced by the Commission has occurred, the Commission shall hold a public hearing; provided, however, if the Commission determines that probable cause exists to believe that a member of the general assembly has committed a violation which constitutes misuse of office for personal gain, the Commission shall not hold a public hearing but shall instead report its determination and findings to the appropriate house of the general assembly pursuant to T.C.A. § 3-6-207 .
- (2) The Executive Director or designee shall provide to the alleged violator and the complainant, by personal service, by certified mail, return receipt requested, or by other mail service which provides verification of delivery, notice of the time, date, and location of the hearing. If the alleged violator is a member of the general assembly, the Executive Director shall additionally provide such notice to the ethics committee of the appropriate house pursuant to T.C.A. § 3-6-203(b)(2).
- (3) The Executive Director shall publish public notice of such hearing in the same manner as public notices of regularly scheduled Commission hearings are posted.
- (4) The public complaint hearing shall not be required to be held pursuant to the contested case provisions of the Uniform Administrative Procedures Act, T.C.A. § 4-5-301, *et seq*; provided, however, if a lobbyist, employer of lobbyist, or an official listed in T.C.A. § 8-50-501 who is subject to the provisions of Title 3, Chapter 6, Part 3 of the Tennessee Code Annotated, is accused of a violation of such part, the Commission shall adopt procedures utilized under the Uniform Administrative Procedures Act, and such public complaint hearing shall be conducted by an Administrative Law Judge assigned by the Secretary of State in the presence of a minimum of four (4) Commission members.

(a) The Commission shall provide for a court reporter to transcribe the hearing, and, if held as a contested case hearing under the Uniform Administrative Procedures Act, Commission staff shall otherwise provide for a record of the proceedings to be maintained as required by T.C.A. § 4-5-319.

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(b) Notwithstanding any provisions to the contrary contained in the Rules of the Tennessee Ethics Commission, Chapter 0580-1-2, Access to Public Records of the Tennessee Ethics Commission, any party may obtain a written transcript of the proceeding directly from the court reporter at the party's own expense.

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(5) A party may be represented by counsel. The Commission shall be represented by its General Counsel or designee.

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(6) The Commission may, on its own motion, as requested by the complainant, or at the request of the alleged violator, issue subpoenas and assess fees related thereto in accordance with the provisions of T.C.A. §§ 3-6-204(a) and 3-6-107(2). Such subpoenas shall be issued through the Executive Director or designee in the form and manner in which subpoenas are issued by clerks of court under the Tennessee Rules of Civil Procedure. Service may be by certified mail, in addition to the means of service provided by the Tennessee Rules of Civil Procedure. Witnesses under subpoena shall be entitled to the same fees as are now or may hereafter be provided by law or by action of the Commission. The party requesting the subpoenas shall bear the cost of paying the fees to the witnesses subpoenaed.

(7) After the Commission has concluded the public complaint hearing, a majority vote of the entire Commission shall determine, based upon a preponderance of the evidence, whether a violation of any law or rule within the jurisdiction of the Commission has occurred and, if so, the appropriate civil penalty or administrative sanction to be imposed; provided, however, the Commission may, if it deems appropriate to do so, set a separate hearing for the consideration of appropriate civil penalties or other administrative sanctions.

(8) In assessing civil penalties or other administrative sanction, the following factors may be considered:

- (a) Whether the amount imposed will be a substantial economic deterrent to the violator.
- (b) Whether the violator has previously committed violations.
- (c) The circumstances leading to the violation.
- (d) The severity of the violation and the risk of harm to the integrity of the processes of government.
- (e) The economic benefits gained by the violator as a result of non-compliance.
- (f) The interest of the public.

(9) The Commission's ruling shall be in the form of an order of the Commission, which shall include:

- (a) Findings of fact and conclusions of law for all aspects of the order and reference to any testimony and exhibits, admitted into evidence at the hearing, on which the respective findings are based; and
- (b) Notice of the date upon which the order becomes final and the time limits for seeking judicial review of the final order pursuant to T.C.A. § 3-6-204(b); provided, however, that if the Commission stays its finding on the assessment of civil penalties or other administrative sanctions pursuant to paragraph (7), above, the order shall be designated an initial order and shall include:
 - i. The date, time and location of the hearing at which the Commission shall consider what sanctions, if any, to impose;
 - ii. The violator's right to submit to the Commission, within fifteen (15) business days after

entry of the initial order, any written documentation the violator wishes the Commission to consider when determining what, if any, administrative sanctions to impose on the violator;

- iii. A statement of any circumstances under which the initial order may, without further notice, become a final order.
- iv. The fact that the initial order is an interim order and that the time for filing a petition for review pursuant to T.C.A. § 3-6-204(b) has not commenced.

- (10) Commission orders shall be signed by the Commissioner who conducted the hearing, and each Commissioner shall additionally indicate by mark whether the individual voted with the majority. Commission staff shall provide copies of the signed order to all parties.

Authority: T.C.A. §§ 4-5-301 et seq.; T.C.A. §§ 3-6-107; 3-6-203 through 3-6-204; 3-6-207.

Legal contact and/or party who will approve final copy for publication:

Bruce A. Androphy, Executive Director
Tennessee Ethics Commission
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Contact for disk acquisition:

Anne F. Turner, General Counsel
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Nashville, TN 37219
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Signature of the agency officer or officers directly responsible for proposing and/or drafting these rules:

Anne F. Turner, General Counsel

The roll-call vote by the Tennessee Ethics Commission on these rulemaking hearing rules was as follows:

	Aye	No	Absent
Thomas J. Garland (Chairman)	—	—	—
R. Larry Brown	—	—	—
Donald J. Hall	—	—	—
Linda W. Knight	—	—	—
Dianne Neal	—	—	—
Benjamin S. Purser, Jr.	—	—	—

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Ethics Commission on the ____ day of _____, 2007.

Further, I certify that the provisions of T.C.A. §4-5-222 have been fully complied with, that these rules are properly presented for filing, a notice of rulemaking hearing has been filed in the Department of State on the _____, 2007 and such notice of rulemaking hearing having been published in the _____, 2007_ issue of the Tennessee Administrative Register, and such rulemaking hearing having been conducted pursuant thereto on the ____ day of _____, 2007.

Bruce A. Androphy, Executive Director

Subscribed and sworn to before me this the ____ day of _____ 2007.

Notary Public

My commission expires on the ____ day of _____, _____.

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Robert E. Cooper, Jr.
Attorney General & Reporter

The rulemaking hearing rules set out herein were properly filed in the Department of state on the ____ day of _____, _____ and will become effective on the ____ day of _____, _____.

Riley C. Darnell
Secretary of State

By:_____